INSOL INTERNATIONAL

# FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

## FORMATIVE ASSESSMENT: MODULE 1

## INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

***This is a*** formative assessment ***relating to*** Module 1 ***and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is*** not compulsory ***and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.***

***The Marking Guide for this assessment will be made available on the web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2023.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way**.** DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1formative]**.** ***An example would be something along the following lines: 202223-336.assessment1formative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked**.**

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.**

6. ***The final submission date for this assessment is*** 15 October 2023**.** ***The assessment submission portal will close at*** 23:00 (11 pm) BST (GMT +1) on 15 October 2023**.** ***No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages**.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

***Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

***It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.***

***(a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.***

***(b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.***

***(c) This statement is true since all systems have at least the same general insolvency concepts.***

***(d) The statement is true since the historical roots of all insolvency systems are the same.***

Question 1.2

***The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.***

***(a) This statement is true since this Act introduced imprisonment of debt.***

***(b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.***

***(c) This statement is true since it introduced the notion of discharge.***

***(d) This statement is true since it introduced fraudulent conveyances into English law.***

Question 1.3

***The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.***

***(a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.***

***(b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.***

***(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.***

***(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.***

Question 1.4

***Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.***

***(a) This statement is true since business rescue is important for socio-economic reasons.***

***(b) This statement is true because liquidation is viewed as a medieval and outdated process.***

***(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.***

***(d) This statement is untrue since some systems have no formal rescue procedure.***

Question 1.5

***The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions – hence these do not pose problems in a cross-border insolvency matter.***

***(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.***

***(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.***

***(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.***

***(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.***

Question 1.6

***The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.***

***In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?***

***(a) Public International Law.***

***(b) UNCITRAL Legislative Guide on Insolvency Law.***

***(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.***

***(d) Private International Law.***

Question 1.7

***Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?***

***(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).***

***(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).***

***(c) UNCITRAL Model Law on Cross-border Insolvency (1997).***

***(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).***

Question 1.8

***Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.***

***Which of the following conventions and treaties does*** not ***provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?***

***(a) Montevideo Treaty on International Commercial Law (1889).***

***(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).***

***(c) Montevideo Treaty on International Procedural Law (1940).***

***(d) Havana Convention on Private International Law (1928).***

Question 1.9

***The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.***

***Which of the following aspects of international insolvency is*** not ***addressed in the EIR Recast?***

***(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.***

***(b) Definition of "centre of the debtor's main interests".***

***(c) A centralised insolvency register of insolvency proceedings opened in member states.***

***(d) Co-operation and co-ordination provisions applicable to corporate groups.***

Question 1.10

***An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?***

***(a) The local Court's jurisdiction over the Debtor.***

***(b) The standing of the foreign Creditor to sue for its debt in the local Court.***

***(c) The foreign liquidator's standing to request a stay of the local proceedings.***

***(d) The fact that the debt owed to the Creditor is in a foreign currency.***

**Marks awarded: 9 out of 10**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

***Explain what the term "international insolvency law" means.***

***"International insolvency law" is a set of rules governing insolvency proceedings or measures applicable across different jurisdictions. These rules are difficult to implement since each jurisdiction may have their own local considerations or otherwise conflicting local rules, therefore these rules are often regarded as "best practices" and/or implemented across jurisdictions to a limited extent.***

2

Question 2.2 [maximum 5 marks]

***Differentiate between the concepts of universality and territoriality in cross-border insolvency.***

***Universality refers to the approach of there being only one insolvency proceeding covering all of the debtor's assets and debts across different jurisdictions, so that only one forum has jurisdiction over all matters concerning the debtor's liquidation. Multiple insolvency proceedings can be commenced in different jurisdictions, however each should be dealt with under the provisions of the insolvency law of the forum jurisdiction. Ideally, the law of the jurisdiction where the debtor has its centre of main interest will be the "main proceeding", which will regulate all insolvency matters concerning the debtor.***

***Territoriality refers to the approach that insolvency proceedings may be commenced in every jurisdiction where the debtor hold assets, but they should be territorially limited and restricted to property within that jurisdiction where the proceedings are opened. Proceedings will be restricted such that only local creditors may file their claims, and the mandate of the insolvency officeholder would be confined to the national borders of the jurisdiction where that insolvency proceeding is taking place. This can lead to multiple insolvency proceedings, and the insolvency laws of various jurisdictions being applied.***

**Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:**
**For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings and recognise it as having extraterritorial effect in their States.**

3.5

Question 2.3 [maximum 3 marks]

***Describe*** three ***recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.***

***A number of Middle East states, such as UAE, Saudi Arabia and Dubai, have reformed their domestic insolvency laws.***

***Bahrain and Dubai International Financial Centre have adopted the Model Law on Cross-Border Insolvency.***

***A regional comparative survey of insolvency systems in the Middle East region was launched in 2009, based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems as an indicator of best practice.*** **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

**More detail would have improved the mark awarded for this sub-question.**

1.5

Marks awarded 7 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

***Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.***

***First, individual bankruptcy aims to protect the debtor from harassment by his creditors. In corporate insolvency, there is less focus on protecting the debtor company from harm; there is greater focus on imposing personal liability on persons responsible for the failure of the company, such as the company's directors.***

***Second, individual bankruptcy often has the ultimate objective of rehabilitation of the debtor – once he is discharged, the debtor can "make fresh start" and continue without the pre-bankruptcy debt burden. Corporate insolvency on the other hand will first seek to rescue corporations and preserve their business (or viable parts thereof) where possible, since this produces better outcome to all the creditors and has advantages for the society in that jobs are preserved; however, if a corporate rescue is not possible, the company will be put into liquidation and ultimately be dissolved after winding up of its affairs. Therefore, rehabilitation/rescue is not possible in every case of corporate insolvency.***

Exempt property is also relevant

4

Question 3.2 [maximum 5 marks]

***Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.***

***First, there could be issues with recognition of and the rights/powers of the foreign insolvency officeholder. Due to differences in the insolvency systems of different jurisdictions, the foreign insolvency officeholder may not be recognised by the domestic court as having been appointed under an "insolvency proceeding", or may not be able to exercise rights or relief available to it under his foreign jurisdiction.***

***Secondly, there are issues with the position of creditors and the priorities they assert in insolvency, since this raises issues of conflict of laws. Security, set-off and netting arrangements, retention of title clauses and other title protection rights held by the creditor available to it in its home jurisdiction, may not be so recognised or enforceable in the foreign jurisdiction.***

***Thirdly, the distribution waterfall of company assets to creditors in one jurisdiction differs from another. Certain local creditors or claims could be afforded higher priority or preferential payment in one jurisdiction, to the detriment of foreign creditors. Therefore, the debtor's assets may not be distributed in a uniform manner to its creditors.***

*Fourthly, differences in avoidance powers available to the insolvency officeholder in different jurisdictions could have varying impact to transactions entered into between creditors and the debtor. Transactions which do not fall foul of anti-avoidance rules in one jurisdiction, could be caught by those in another jurisdiction.*

*Fifthly, there may be a lack of legislative framework for cooperation and communication between the domestic court and the foreign court. The lack of an official channel between courts to deal with requests, directions, instructions, etc. for the insolvency officeholder and creditors could result in uncoordinated or conflicting results for stakeholders involved in the insolvency proceedings.*

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
3.5

Question 3.3 [maximum 5 marks]

***What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.***

*UNCITRAL has promulgated the Legislative Guide on Insolvency Law in 2004, which is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations, or reviewing adequacy of existing laws and regulations. If jurisdictions address these issues in a similar manner, this could promote harmonisation of domestic insolvency laws.*

*The World Bank has also produced guidelines on the regulation of insolvency, entitled Principles for Effective Insolvency and Creditor/Debtor Regimes, in the early 2000s which has been continuously updated. This has promoted harmonisation of domestic insolvency laws at least for developing countries, since the World Bank may require bankruptcy reform in these countries as a condition of loan support.*

*The European Union has published a report on Harmonisation of Insolvency Law at EU Level, which outlined key differences between domestic insolvency laws within the EU, where harmonisation could be worthwhile and achievable. The European Commission also published an Action Plan on Building a Capital Markets Union, which encouraged convergence of insolvency and restructuring proceedings at least within the EU.*

*I believe these efforts will have an impact in pushing for harmonisation of less controversial areas of national insolvency laws (such as access to domestic courts by foreign insolvency officeholders, court cooperation and coordination mechanisms, etc.), but there remains fundamental and potentially irreconcilable differences between insolvency laws of different jurisdictions in other respects where harmonisation would be very difficult to achieve (such as a common test of*

*"insolvency", avoidance powers and rules, directors' responsibilities, executory contracts and termination on insolvency, domestic and foreign creditors' priorities, etc.). Nevertheless, any harmonisation of insolvency laws across jurisdictions would be helpful to increase efficiencies in cross-border insolvencies and ultimately produce benefits to debtors and creditors alike.*

**There is scope to consider political pressure, foreign investor pressure and/or loan conditions.**

**4**

**Marks awarded 11.5 out of 15**

QUESTION 4 (fact-based application-type question) [15 marks in total]

***Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.***

***Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.***

***If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.***

Question 4.1 [maximum 5 marks]

***Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.***

***If Utopia is a monist state, the UNCITRAL Model Law on Cross-border Insolvency ("Model Law") should have effect automatically under the laws of Utopia; whereas if it is a dualist state, then the Model Law needs to be "transposed"/"domesticated" into local laws of Utopia.***

***As to the Cross-border Insolvency Act of Utopia ("Cross-border Act"), it should be ascertained how closely it corresponds to the Model Law.*** You have been told to assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by

Utopia without modification ***This could give rise to various scenarios – (i) the Cross-border Act closely corresponds to the Model Law, and there are no issues in applying relevant principles; (ii) the Cross-border Act is different to the Model Law and Utopia is a dualist state, in which case the Cross-border Act applies but conflicts with an international instrument signed by Utopia, in which case the Cross-border Act potentially may be challenged for unconstitutionality under Utopia law; or (iii) the Cross-border Act is different to the Model Law and Utopia is a monist state, in which case a conflict in applicable law arises, and the approach to resolve such conflicts depends on relevant Utopia law principles.***

***Assuming that the Cross-border Act closely corresponds to the Model Law, then it could possibly assist the Erewhon liquidator since:***

- ***there could be a simplified and easily accessible mechanism for the Erewhon liquidator to apply to the competent Utopia court for recognition of the Erewhon insolvency proceeding (c.f. Articles 15 to 17, Model Law); and***

- ***various relief could be available to the Erewhon liquidators from the Utopia court prior to and following recognition, more importantly a stay against the continuation of individual actions or proceedings concerning Nadir such as the Apex court proceeding against Nadir (c.f. Articles 20 to 21, Model Law).***

4.5

Question 4.2 [maximum 2 marks]

***Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?***

***(a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.***

***Assuming the Cross-border Act closely corresponds to the Model Law, the Erewhon liquidator could still apply for recognition in the competent Utopia court, however the Cross-border Act may not prohibit concurrent insolvency proceedings from taking place. Therefore, recognition of the Erewhon liquidator may not prevent Apex from commencing domestic insolvency proceedings against Nadir, hence there will not be a stay of the winding-up proceedings (c.f. Article 28, Model Law). It is possible that concurrent domestic and foreign insolvency proceedings can exist after recognition, or filing of application for recognition, of the foreign proceeding (Article 29(b), Model Law).***

***(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.***

***Depending on the applicable insolvency laws of Utopia, winding-up of Nadir in Utopia may already have brought about a stay of individual creditor action against***

***Nadir in Utopia court. Assuming the Cross-border Act closely corresponds to the Model Law, the Erewhon liquidator should still be able to apply for recognition in the competent Utopia court, however where there are concurrent proceedings, it could be that the relief granted to the Erewhon (foreign) liquidator must be consistent with that granted to the Utopia (domestic) liquidator (c.f. Article 29(c), Model Law).***

There is scope to elaborate re **Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.**

1.5

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

***A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.***

***Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?***

***Assuming the company was incorporated in Hong Kong, based on the insolvency laws of Hong Kong, there could be the following issues facing the Hong Kong insolvency representative:***

- ***Seeking recognition and assistance from other states where the corporate debtor's assets are located. Hong Kong corporate insolvency laws are mainly based on the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) and common law, and there is a lack of statutory provisions governing cross-border insolvency cooperation and coordination. There may be a lack of reciprocity between Hong Kong and other foreign states, resulting in lower willingness of other states to recognise and grant assistance to the Hong Kong insolvency representative. This should not be an issue for states which have adopted the UNCITRAL Model Law on Cross-border Insolvency ("Model Law"), since the lack of reciprocity should not be a bar to recognition and assistance foreign insolvency proceedings under the Model Law. There are also arrangements for mutual recognition and assistance in insolvency proceedings in place between Mainland China and Hong Kong (albeit only in certain pilot test Chinese cities), which could assist the Hong Kong insolvency representative in seeking recognition and assistance in Mainland China.***

- ***Dealing with the rights of foreign creditors in Hong Kong insolvency proceedings.*** **If the foreign creditors claim to have rights against the Hong Kong corporate debtor under instruments not governed by Hong Kong law, Hong Kong conflict of law rules would allow the HK Court to refer to expert evidence on the governing law of that instrument to ascertain the validity and effectiveness of said creditor claims. The Hong Kong court could also take into account local policy considerations in deciding how to deal with such foreign law claims, notwithstanding the expert evidence available.**

- ***Enforcement of rights against foreign assets.*** **Under Hong Kong law, on a company's winding-up, all assets of the company will come under the control of the liquidator and all actions against the company will be stayed. The Hong Kong insolvency representative will need to take control of foreign assets to centralise realisation and distribution of proceeds. In states where the Model Law is adopted, assuming the Hong Kong insolvency proceeding and the relevant representatives are recognised, local courts in such states could grant appropriate relief including allowing the Hong Kong liquidator to collect in the assets located in the foreign jurisdiction, staying any pending action against the company, and suspending/staying execution against the company's assets (Article 21, Model Law).**

- ***Commencing claims against foreign entities in foreign states.*** **Under Hong Kong law, the appointed liquidators displace the directors of the company, and have powers to bring or defend any action in the name and on behalf of the company. However, foreign courts may not necessarily recognise the Hong Kong liquidators as having standing to bring actions against others in the name of the company under their local laws. The Model Law may assist for foreign states which have adopted this, since foreign insolvency officeholders are given standing in the courts of the enacting state to bring various actions on behalf of the wound up company (either following recognition or without recognition, Articles 9, 11 and 12, Model Law).**

**This is a satisfactory response. For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.**

6

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS 39.5/50

**A very good paper that generally addresses the questions asked and substantiates its answers.**